

31st May 2017

Christine Dalby
UK Head of Representation
The European Commission
Europe House
32 Smith Square
London
SW1P 3EU

Dear Ms Dalby,

I'm writing to draw the Commission's attention to a possibility that the recent notification of Britain's intention to withdraw from the European Union could, in principle, be successfully repudiated by a future administration.

As you know, Article 50 of the Lisbon Treaty states that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. You will, I'm sure, be aware that Britain's constitution is not well defined, but you are quite likely not aware that one of its central pillars is less certain than is generally assumed.

In the words of the late Lord Bingham (in his book, *The Rule of Law*) "respected and authoritative voices now question whether parliamentary sovereignty can coexist with the rule of law". There is a conflict between long-standing convention and recently-established principles of law and justice; a conflict which has been openly discussed by senior members of the judiciary, but which successive governments have chosen to ignore. The relevance of that unresolved conflict lies in the question of whether, in deciding to withdraw from the EU, Parliament and the Government have fulfilled any duty of care that they owe to the public and to future generations.

Please understand that the question I'm raising is not about whether it is right for Britain to withdraw. It is a question of process: has the decision been arrived at with due care and attention? Nor am I suggesting that it is probable (in the absence of major changes to Britain's political landscape) that a future administration would seek to repudiate it. Rather, I wish to suggest that taking steps to pre-empt the possibility would benefit both Britain and the European Union, by obliging this country to confront the underlying problems which led the British public to vote to leave.

I should perhaps make it clear, here, that I'm writing as an ordinary member of the public. Although I have been thinking and writing about constitutional issues for many years, and think of myself as a jurist, I don't have any formal background in law or politics. However, the arguments below rest on relatively straightforward principles rather than on the intricacies of law, and I am confident that they are sound.

There are two aspects to the issue I'm raising: a primary, purely constitutional question of whether parliamentary sovereignty is still the central pillar of our constitution, and a secondary 'factual' question of whether the decision to withdraw has been arrived at in a manner consistent with any duty of care that our leaders are bound by.

Parliamentary sovereignty and the rule of law

Most people in Britain, and no doubt in Europe, just assume that notification will be valid: there is a long-standing convention that Parliament is sovereign within Britain so, if Parliament authorises withdrawal, the decision must be constitutionally legitimate.

However, that assumption ignores the unresolved conflict that I referred to above. Before Britain's Article 50 notification can be judged valid, we need an answer to the constitutional question: is parliamentary sovereignty subordinate to the rule of law? Are Parliament and Government under any obligation to exercise due care and attention in how they perform their duties or are they free, between elections, to govern as arbitrarily as they choose?

Some people will argue that parliamentary sovereignty is the central pillar of the British constitution and cannot be called into question. But that doctrine emerged at a time when Parliament was very different from how it is today. As Lord Bingham and others have pointed out, it comprised three independently powerful bodies – Crown, Lords and Commons – who were each able to block legislation. That is manifestly not the case today, when the Commons is clearly supreme and can push through any laws it sees fit.

There might have been a sound basis for the doctrine in the past but it has now become an arbitrary convention whose strength rests almost entirely on a negative: the fact that no other body can claim to be the ultimate decision-making authority (at national level, at least – and therein lies a layer of complexity that I will come back to).

From that perspective, it has to be recognised that the validity of the current Article 50 notification cannot be taken for granted. Nobody, even in Britain, can say with any confidence whether Parliament is bound by the rule of law. If it is, then surely it has a duty, just like everyone else, to exercise responsibility in how it performs its function. And that brings us to the question of whether it has done so in this particular case.

Before looking at that, however, there is another perspective that needs to be considered: has the doctrine of parliamentary sovereignty been superseded by a doctrine of wilful popular sovereignty?

Parliamentary sovereignty and the will of the people

For many people in Britain, it seems to be enough that a referendum has been held, and a majority have voted to leave. That's an understandable position for people outside politics who feel that 'occasional democracy' is all they can expect – that government only ever listens to the will of the people on those rare occasions when ballots are held – but is it a reasonable position for those in authority to take?

The decision to withdraw from the EU is primarily based on a relatively slim majority in a single ballot, whose result came as a surprise to most of the political establishment. Few, if any, of the other countries of Europe would regard that as a proper mandate for such a major step: most constitutions would require either a clear consensus or a settled majority. And it does, in fact, seem to be a major departure from established constitutional practice within Britain.

As far as I'm aware, British democracy has never consisted of simply obeying the will of the people as it was expressed at one single moment, or following it blindly as it twists and turns in response to events. The convention has always been that Members of Parliament are representatives who consider the *enduring* will and needs of the people they represent and act according to their judgement on that, rather than delegates who are simply mouthpieces for the people's wishes.

On this occasion, however, many British MPs have – quite openly – voted for a course of action that they believe will bring considerable harm, and that they expect the country to regret. The justification they've given is that the will of the people, as expressed last June, is sacrosanct. If this justification is to be believed, the traditional pattern of democracy in this country has been set aside.

Within this decision, therefore, are two distinct constitutional changes: the obvious one, concerning Britain's relationship with the European Union, and a more subtle one which concerns the core dynamics of the country's internal democracy. The referendum result does, on the face of it, provide a mandate for the first of those changes but it does not, in itself, provide any authority for the deeper change, nor does it in any way demonstrate that such a change is something the public wants.

From that particular perspective, I suggest, there are serious doubts whether the decision is consistent with our own constitutional requirements.

That perspective, however, rests on a presumption of integrity which should not be taken for granted. Were the Members of Parliament who voted against their own better judgement genuinely motivated by a desire to fulfil the will of the people? Or were they motivated by a political calculation that, if they voted for what they themselves believed was in the country's best interests, they would probably lose their seats at the next election? In other words, was the decision taken with the integrity which our constitution requires?

I see little evidence to support it. Members of Parliament know perfectly well that Britain's current system could easily be reformed to give the public more continuous power (through citizens' initiatives and effective procedures for electorates to recall their representatives, for example). They also know that the public's ability to express their will could be greatly enhanced by allowing them to rank candidates, or options, on ballot papers.

There are valid arguments against such reforms within the kind of representative democracy that has traditionally operated within Britain. But those arguments rest on the importance of stability and the responsibility that elected representatives have for examining complex issues in more depth than the public at large have the time or inclination for. Those are factors which are inimical to the kind of wilful democracy that is currently being promoted.

If British MPs were genuinely committed to a principle of wilful popular sovereignty, as their justification for the Brexit decision implies, one would expect them to be actively pursuing reforms to enhance the public's ability to express its will. Instead we saw Parliament reject a motion to reform the electoral system, shortly after the EU referendum, with no more than a cursory debate. Indeed, the Conservative Party even has a manifesto commitment to maintain the first-past-the-post voting system for national elections and extend it to other elections in which, currently, voters *are* able to express more than one preference. On the face of it, there is very little reason to believe that British politicians are truly committed to following the will of the people, other than when they feel their positions to be in jeopardy.

A valid mandate?

The evidence that Members of Parliament genuinely respect the will of the people is equally sparse when we look at the specific issue of Britain's membership of the European Union. The referendum result does indeed, *on the face of it*, provide a democratic mandate for Britain to leave. But does that mandate stand up to closer scrutiny?

In fact, when MPs claim the result of a single referendum as a democratic mandate, they are denying a basic form of respect that we take for granted in everyday life. If a salesman talks us

into signing up for a service we don't really want, British law allows us a cooling-off period in which to change our minds. If we buy something over the internet that we've never seen, the law gives us an opportunity to reject it if it doesn't fit the description given. Those laws are based on a recognition that our decision-making processes are imperfect and are often influenced by misinformation and momentary bias. The referendum result on its own can only be regarded as an adequate mandate if the cautionary principles that operate in the commercial sphere do not also apply to our decisions in the political sphere. Is that reasonable? Is there any evidence that that's what the British public wants?

In some circumstances – if it shows a clear consensus, or if there is compelling urgency – a single poll can indeed demonstrate the will of the people. But when there are doubts about people's reasons for voting as they did, or about the integrity of the information they based their decisions on, then treating a single poll as a definitive demonstration of the public will is manifestly unsatisfactory. In this particular case – where there is significant evidence that many people's vote in the referendum was motivated more by anger at the failings of our own internal governance than by a genuine belief that our membership of the EU is undesirable – the failure to seek confirmation that this is truly what we want borders on wilful negligence.

There are other, more nuanced, arguments I could put forward for why a responsible administration should treat the result of the referendum with extreme caution. My purpose here, though, is merely to show that the referendum result – the declared basis of the decision to leave – cannot be taken as a clear indication of the will of the people.

It may be that a court, after considering all the arguments, would find that Members of Parliament have properly fulfilled their duty and that the country has indeed expressed a clear wish to leave the Union – but I don't see how those things can reasonably be taken for granted.

Britain's constitution in the EU's hands

With those questions open to doubt (does Parliament have a duty of care? has the doctrine of parliamentary sovereignty been superseded by a doctrine of wilful popular sovereignty? and do the British people truly want to leave Europe?) the European Union has a choice of whether it should treat Britain's withdrawal from the Union as a settled fact or force us to confront the incoherence of our own constitution.

I believe the doubts I've raised here justify a request for confirmation from the European Court of Justice as to whether this notification satisfies the requirements of Article 50. The constitutional questions are obviously not ones the ECJ could answer themselves so they would undoubtedly seek an opinion from the UK Supreme Court and that, I believe, would push Britain into having a proper constitutional debate – which would probably oblige the British government to seek proof of a proper mandate.

At worst, that path would delay negotiations for a few months. At best, there is the possibility that we might change our minds – and that our debate could help the EU resolve some of its own internal conflicts.

Levels of sovereignty

As I suggested above, a core feature of a proper constitutional debate in the UK will be the soundness of the doctrine of parliamentary sovereignty, a doctrine which is seriously undermined by the changes which have taken place over the last few centuries in the make-up of Parliament.

A significant point – rarely made – is that members of the House of Lords used to be local rulers. That was a key part of why Parliament was recognised as sovereign, because Parliament

was where the different vectors of power came together. By creating a degree of integration between local and national government, it provided a place where conflicts between them could be resolved. For practical purposes, the Lords represented the aggregate voice of local government – and their presence in Parliament constrained the ability of central government to interfere too much in local affairs. That is manifestly not the case today, when our elected representatives at Westminster are deemed to have unfettered authority over our elected representatives at more local levels, even in matters that are unarguably local.

In a mature society there must be a process for determining how different levels of government share power, a process that clearly establishes which decisions need to be taken at higher levels, and ensures both that higher levels of government do no more than is appropriate and that local authorities cede sovereignty on matters that are genuinely of broader concern.

Defining that process – and ensuring that it reflects changes in society's values and circumstances – has to be a central function of a political constitution. It is a function which the British constitution manifestly fails to fulfil. The effects of that failure are visible in the dissatisfaction of local communities throughout the country, they are tangible in the tensions between Westminster and the devolved administrations, and they have erupted into the open through the electorate's vote to leave the European Union.

These are not separate issues. Britain's relationship with its European neighbours, the relationship between the four countries of the United Kingdom, the relationship between local and central government generally – these are all different aspects of a broader constitutional question: how should sovereignty be distributed between different levels of society?

But this is not a question for Britain alone. It's a question which is fundamental to the EU itself, as well as to every single one of its member states, and European politics will continue to be unstable until it is properly addressed.

The leaders of the European Union can resist the pressure for change, by taking Britain's current Article 50 notification at face value and hoping that dissidents within the remaining member states lose heart. Or they can embrace the potential of the moment and open up a proper debate, by asking a question that Britain itself has refused to face up to: what exactly does the British constitution require?

I, a British citizen, am writing to the European Commission, suggesting that you seek clarification of Britain's internal constitution. In most circumstances that would be inappropriate – a private citizen should normally apply for clarification of local law to local courts – but there are a number of reasons why I feel it's more appropriate for me to approach you instead.

One is that I am not personally very concerned whether Brexit goes ahead or not. I have argued for years that, for all its strengths, the current British political system is fundamentally flawed and I have proposed a number of radical changes, around a core principle that political power should be exercised as locally as possible. I have long recognised that Britain's membership of the EU, in its current form, may not be compatible with that principle. For that reason I was essentially neutral about the referendum and don't see our disengagement from Europe as inevitably damaging.

My instincts tell me that the next four or five years are going to be critical for Britain (and probably Europe) whether Brexit goes ahead or not. I must confess, I see potential in the turbulence that a divorce would bring, for a more profound transformation of British society than would be likely through the path I have proposed above and I don't therefore feel any obligation to apply to a British court for a judgement on the issue. If Brexit does go ahead, however, many

people will clearly feel their lives being torn apart. So, on balance, I think it would be irresponsible of me not to point out this possibility.

The current political establishment in Britain seems to be incapable of providing the mature governance that a healthy society requires. Perhaps the European Union can prompt us to reflect on what we really need.

Best regards

Malcolm Ramsay